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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1979

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**No. 78-1821**

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UNITED STATES OF AMERICA,  
*Petitioner,*

v.

SYLVIA L. MENDENHALL,  
*Respondent.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Sixth Circuit

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**BRIEF OF NATIONAL LEGAL AID AND DEFENDER  
ASSOCIATION, AS AMICUS CURIAE  
IN SUPPORT OF THE RESPONDENT**

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TERENCE F. MACCARTHY  
CAROL A. BROOK  
219 S. Dearborn Street  
Suite 1744  
Chicago, Illinois 60604

*Counsel for Amicus Curiae*

December 19, 1979



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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Solicitor General of the United States, counsel for the Petitioner, and by Kenneth Sasse, Esq. and F. Randall Karfonta, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of this Court.

### INTEREST OF THE AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to the poor. Its members include the great majority of defender offices, coordinated assigned counsel systems and legal aid societies in the United States. The membership of NLADA also includes two thousand individual members, most of whom are private practitioners.

In its attempt to provide effective legal services to the poor, NLADA necessarily must defend against governmental attempts to limit the reach of constitutional protections. We say "necessarily" because it is always the poor who are most immediately affected by such incursions and who are least able to defend against them. Parenthetically this very case well supports this point.

It is our particular concern in this case to point out the actual effect the government's position would have on poor people, particularly Black and Hispanic poor people, as well as to refute the argument that this Court's failure to formally approve the use of drug profiles will "threaten the use of legitimate and necessary law enforcement techniques extending beyond the facts of this case." Brief of Americans for Effective Law Enforcement, Inc. as Amicus Curiae at 2 (hereinafter "AELE Brief"). Although we concur in and wholeheartedly support the legal arguments set forth in Respondent's Brief, we will not restate them here. Instead, we will specifically address ourselves to the policies underlying continued judicial adherence to the teachings of the Fourth Amendment.

## ARGUMENT

### I. The Factors Selected By DEA Disproportionately Burden Poor And Hispanic People

Amicus would first reiterate that, as the government concedes in its Brief at 31-32 & n. 23, there is no "drug courier profile." As the court noted in *United States v. Chambers*, 425 F.Supp. 1330, 1333 (E.D.Mich. 1977):

One problem with determining the propriety of the stop solely on the basis of whether or not the defendant met the profile is that the factors present in the profile seem to vary from case to case. Special Agent Wankel himself testified that the profile in a particular case consists of anything that arouses his suspicions. A look at the profile cases themselves tends to show that the factors present in the profile tend to change.

Further support for this position comes directly from Customs Inspector Thomas Lepert, who said, when asked by National Public Radio how he knew which persons to stop for narcotics smuggling:

There are so many profiles as to what makes a smuggler and actually none of them hold any validity because the smugglers try very hard not to fall into any profile. . . . If you feel that there's something about this guy—he is betraying nervousness or he shows anxiety over the fact that you know he is just jittery or whatever—these are little signals to you that maybe you wouldn't be able to define in terms afterwards if somebody said, "Well, why did you go after this guy?" You know, the overall thing is *I had an impression that maybe he had narcotics*. [Emphasis added].<sup>1</sup>

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<sup>1</sup> A transcription of the entire interview which was aired on National Public Radio on November 20, 1979 is attached hereto as Appendix, 1a. A tape recording of the interview supplied by National Public Radio has been filed with the Court.

In light of the fact that the "experience" of the DEA agents so heavily relied upon by the government, (*see, e.g.*, Gov. Brief at 31-33, 35), comes from work with Customs,<sup>2</sup> it is most revealing that Customs itself works largely on hunches and guesses. And further one wonders where DEA Task Force agents obtain their training and experience, when those agents are often local police officers who have been promoted to new spots created by increased LEAA funding. *See generally* "Federal Drug Enforcement," Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations, 94th Cong., 2d Sess. 929, 998-1006 (Part 4 1976) (Report of the Comptroller General of the United States, "Federal Drug Enforcement: Strong Guidance Needed" [December, 1975]).

#### ***Who Is "Profiled"***

What we have then, is the reliance of agents on pre-determined factors that continually change. Or, as the government says at 32 of its Brief, the profile "is constantly modified in light of experience." Which means that every time a new "suspect" is caught with narcotics, his or her eccentricities are added to the profile. What's more, some of the profile characteristics are kept "secret." *See United States v. Van Lewis*, 409 F.Supp. 535, 538 (E.D.Mich. 1976).

The result is that agents are predisposed to search a selected group of people who:

- a. travel with "insufficient" luggage,

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<sup>2</sup> *See, e.g.*, *United States v. Rico*, 594 F.2d 320, 321 (2d Cir. 1979).

- b. dress differently than the majority of air travelers,
- c. pay for their tickets in small denomination currency,
- d. appear nervous,
- e. use public transportation in departing the airport, and
- f. are of Hispanic (especially Mexican) descent.<sup>a</sup>

In other words, people who:

- a. cannot afford much luggage;
- b. do not dress neatly and tastefully;
- c. do not have checking accounts;
- d. do not carry large sums of money;
- e. are uncomfortable in unfamiliar environments (airports);
- f. do not have friends who are able to leave home or work to pick them up (or perhaps do not have friends who can afford the cost of gasoline); and
- g. are Hispanic.

#### ***Discriminatory Results***

It is clear that all these characteristics apply first and foremost to poor people, especially poor Hispanic

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<sup>a</sup> See, e.g., *United States v. Price*, 599 F.2d 494, 500 (2d Cir. 1979); *United States v. Elmore*, 595 F.2d 1036, 1039 & n. 3 (5th Cir. 1979); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Ballard*, 573 F.2d 913, 914 (5th Cir. 1978); *United States v. McCaleb*, 552 F.2d 717, 719-20 (6th Cir. 1977); *United States v. Westerbann-Martinez*, 435 F.Supp. 690, 692-93 (E.D.N.Y. 1977).

people who traditionally fear law enforcement agents and who may not even speak English.<sup>4</sup> Here, further enhancing the innate fear of the poor and powerless of police generally is the fact that the agents seem to “appear” out of nowhere, not in uniform, flashing badges, asking questions (in English) and taking “suspects” into private rooms. Certainly this approach greatly enhances the fear and anxiety to which this Court referred in *Delaware v. Prouse*, 99 S.Ct. 1391, 1398 (1979). Such “secret police” type tactics, far from furthering a significant national interest instead engender greater fear and anger toward police, contrary to the uncontroverted national interest in developing positive attitudes toward law enforcement personnel. This is especially true, of course, where innocent people are seized.

It thus becomes important to determine how many innocent persons are being subjected to intrusions based on the “profile” because, to the extent these persons constitute an insular and discrete minority, such intrusions may violate their constitutional right to equal protection of the law. *See generally*, Comment, “Minority Groups and the Fourth Amendment Standard of Certitude: *United States v. Ortiz* and *United States v. Brignoni-Ponce*,” 11 Harv. C. R.-C. L. L. Rev. 733, 755-57 (1976).

#### ***Statistics Offered By The Government***

The government notes that no comprehensive statistics have been kept on the success or failure of the drug profile in detecting drug couriers. Gov. Brief at

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<sup>4</sup> *See e.g.*, *United States v. Rico*, 594 F.2d 3201 (2d Cir. 1979); *United States v. Westerbann-Martinez*, 435 F.Supp. 690 (E.D.N.Y. 1977).

32 & n. 24. Nor are the statistics cited in Judge Weick's dissent below (Pet. App. 4(a) n.1) of any help because they do not show how many of the seizures were made by Customs, how many were made pursuant to a drug courier profile alone or the estimated amount of each drug that passes through the airport undetected.

The only other statistics relied upon by the government are those mentioned in *United States v. Van Lewis*, 409 F.Supp. 535, 539 (E.D.Mich. 1976). There it was revealed that statistics are not kept as to the number of persons searched—only statistics as to the number of “search encounters” are kept and “search encounters” may include any number of people. Nonetheless, of particular significance for the purposes of this case, the court in *Van Lewis* found that no contraband was uncovered in “15 to 25” of the 26 cases in which consent to search was given. The total number of searches appears to have numbered 141. Of these, 77 searches appear to have disclosed contraband. Amicus uses the word “appears” because the figures are not clear. (Note, for example, that the 26 consent searches and the 43 non-consent searches do not equal either the 77 searches in which contraband was discovered or the 141 persons searched.)

At best, these statistics do reveal that a fairly high number of innocent persons are searched, based at least in part on the drug courier profile. We can only guess at the numbers in other airports since they are completely unrecorded. What they do not reveal, but what is clear from an analysis of the “confluence of factors,” is the adverse effect the use of the factors has on the poor and particularly on the poor who are also members of a particular minority group. Because of this effect and the equal protection problems inherent therein,

Amicus respectfully submits that airport searches based on factors which inevitably focus on members of a minority must be carefully scrutinized to determine whether the results of the searches are significant enough to warrant the infringement.

#### ***Additional Statistics And An Interpretation***

It is noted in the AELE Brief at 3-4 that the question of "reasonable suspicion based upon articulable facts under the common law stop and frisk authority of *Terry v. Ohio*, 392 U.S. 1 (1968), is one of exceptional importance to the Federal Government in view of the large quantities of narcotics flowing into airports such as Detroit from other cities around the country." The empirical data cited in support of this statement is scant. (Parenthetically, this statement misses the point that *Terry* created a limited exception to ensure the safety of the police.) Indeed, the only data anywhere cited by the AELE or the government lists the type and amount of narcotics seized at Detroit Metropolitan Airport.

The deficiencies of these statistics were noted by Amicus *supra* at 6. Amicus will therefore attempt to remedy some of those deficiencies here.

Approximately 6,600 pounds of illicit heroin were smuggled into the United States in 1970 compared with over 100,000,000 tons of legal goods imported that year. Customs seized under five percent of the heroin in what was, for them, a better than average year. Further, the United States heroin market can be completely satisfied with between four-five tons of heroin per year.<sup>5</sup>

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<sup>5</sup> "The Global Connection: Heroin Entrepreneurs," Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the

Consider also:

The Consumers Union estimates that if Customs seizures quadrupled, the effect would only represent an increase in price of two cents per five dollar street bag. Thus, a substantial increase in the effectiveness of anti-smuggling enforcement would not result in eliminating narcotics traffic but, rather, would only serve to increase street prices (or increase adulteration). Raising the U. S. market price for heroin might also divert heroin now distributed in Europe to a more profitable U. S. market.

*Id.* at 741 (footnotes omitted).

The few statistics cited by the government must be read in light of the following:

1. "By now, any professional law enforcement officers, . . . and most of the more astute reporters among our news media have learned that reporting of large weights of heroin seized is meaningless without an indication of the purity of the drug. We all know that such seizures, alone, are of little significance as to the impact made on source channels from which the drug originates."<sup>6</sup>

2. In contrast to public statements made by DEA officials in 1976 to the effect that Class I heroin arrests

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Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 741 (1976) (Israel & Denardis, "The Irrationality of a Law Enforcement Approach to Narcotics," 50 J. Urban L. 631 [1973]) (hereinafter "Global Connection Hearings").

<sup>6</sup> "Federal Drug Enforcement," Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations, 94th Cong., 2d Sess. 1297 (Part 5 1976) (Statement of Martin F. Pera, Former Chief of Domestic Investigations, Office of Enforcement, DEA) (hereinafter "Federal Drug Enforcement Hearings").

increased 106% over a nine month period, DEA's Program Performance Measurement Publication for the third quarter of fiscal year 1976 stated:

National price and purity data for the third quarter, fiscal year 1976 indicate an increase in heroin availability which signifies a definite trend. Heroin retail purity, currently at 6.64% at the national level, is at the highest recorded point since 1971.

\* \* \* \* \*

During this quarter, there was a reported increase in availability in all areas except the Southern and Western states.

*Federal Drug Enforcement Hearings at 1299.*

Thus, query whether the effectiveness of DEA enforcement programs may be determined based on its arrest and seizure statistics as the government apparently is asking this Court to do here.

3. Every reported hearing, journal or statistical study by or about DEA notes that an effective drug interdiction program must consist of (a) stopping the importation of illegal drugs, preferably in the countries where they originate<sup>7</sup> and (b) arresting the high level

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<sup>7</sup> See, e.g., "Oversight Hearings on Narcotics Abuse and Current Federal and International Narcotics Control Effort," Hearings Before the Select House Comm. on Narcotics Abuse and Control, 94th Cong., 2d Sess. 373-380 (1976) (Statement of Hon. Charles W. Robinson, Deputy Secretary of State) (E.g., "The principal challenge today is about the same as it was 5 years ago: the flow of heroin into our country. In fact, that is the principal problem and we are attacking it, making this our primary target for attack." *Id.* at 374); Global Connection Hearings at 556 (Report to the Congress, Efforts to Stop Narcotics and Dangerous Drugs coming from and through Mexico and Central America by the Comptroller General of the United States: As of October, 1974, 70% of all heroin reaching the United States came from Mexico).

drug smugglers (Class I and Class II violators), and cutting back on street level arrests.<sup>8</sup>

Taken together, the above statements and empirical data make clear that airport stops of suspected drug couriers or "mules" coming from other cities *in this country* are not a high priority of the government and do not significantly affect the flow of narcotics in this country.

Even more telling is the fact that to the best of our knowledge, in all the thousands of pages of hearings on drug enforcement, the use of the drug courier profile as a significant interdiction tool is never discussed. Further, the "DEA Domestic Operations Guidelines" promulgated in December of 1976<sup>9</sup> nowhere even mention the word "profile," much less delineate guidelines for its use.

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<sup>8</sup> See, e.g., "IRS: Taxing the Heroin Barons," Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. Vol. II 113 (1976) (Statement of Richard L. Thornburgh, then Assistant Attorney General, Criminal Division, Department of Justice) ("On the investigative side, we can only applaud DEA Administrator Peter Bensinger's promise that DEA efforts 'will not be on the street dealer, but on the financier, importer, the criminal organization leader or leaders' and to this end we are devoting substantial prosecutive resources ourselves. . . ."); Federal Drug Enforcement Hearings (Part 5) at 1321 (Joint Statement of James M. Cannon, Assistant to the President for Domestic Affairs and Executive Director, Domestic Council and James T. Lynn, Director, Office of Management and Budget) ("The first major theme is that there should be more selectivity and targeting of Federal law enforcement efforts, these efforts should focus on the arrest of leaders of high-level trafficking networks, and should move away from 'street-level' activities.").

<sup>9</sup> The Guidelines may be found in "FBI Statutory Charter," Hearings Before the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 163-78 (Part 1 1978).

The only conclusions to be drawn from this pervasive silence (and from the vague and conflicting discussion of drug "profiles" in the case law) are that (a) there is no structured profile; (b) its use is not monitored or regulated (recall no comprehensive statistics have been kept on it nor are there any regulations on it); and (c) it is not important to or successful in interdicting narcotics.

***The Results of the "Profile" Balanced Against the Constitutional Intrusion on Poor and Hispanic Persons***

The above factors must be balanced against the effect of the profile. It is respectfully submitted that the use of the profile alone as a determinant for stopping persons (and almost universally strip searching them thereafter regardless of their initial responses) results in large scale invasions of the rights of poor and Hispanic people to be free from unreasonable searches and seizures. Clearly, the balance here is heavily weighted in favor of the constitutional rights of innocent poor and Hispanic people. Any other result would signal the beginning of a random stop system in this country, much like that in *Brown v. Texas*, 99 S.Ct. 1637 (1979), for, as a practical matter, there is little difference between a regime that will arrest you for your refusal to answer questions (*Brown v. Texas*) and one that uses your refusal to answer questions as grounds for a body search.

## II. Drug Courier "Profiles" Are Unlike Both Anti-Hijacking And Composite Sketch Techniques

### *A Comparison With Anti-Hijacking Techniques*

AELE asserts in its Brief at 5-9 that the drug courier profile is analogous to the anti-hijacking profile. Amicus would respectfully suggest to this Court the many and significant differences between the two. (Amicus will not here discuss the possible objections to the anti-hijacking procedures).

1. The initial anti-hijacking system described in the AELE Brief at 5 which began with a profile and proceeded to a magnetometer to an interview to a search is no longer used because it proved to be ineffective.<sup>10</sup> Thus, in 1973 the FAA ordered all airlines to institute routine searches of all carryon items and magnetometer screenings of all passengers. The Airport Search at 308.

2. These screenings are highly regulated by the FAA. See 14 C.F.R. § 121.538 (1973). Compare this to the complete lack of regulation or compilation of data in the drug profile cases.

3. Weapons searches are conducted in front of the public and are thus under constant scrutiny. Compare this to the persons who are questioned outside the public view and searched behind closed doors. In this regard, note that nowhere has the government cited to the alleged airport regulation which requires private searches.

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<sup>10</sup> Only 6% of all persons ultimately frisked under this system were carrying weapons. Note, "The Airport Search and the Fourth Amendment: Reconciling the Theories and Practices," 7 U.C.L.A. Alas. L. Rev. 307, 308 n.9 (1978) (hereinafter "The Airport Search").

4. Airline representatives are always present at weapons searches and they have "a substantial interest in assuring that their passengers are not needlessly harassed." *The Airport Search* at 313. *See also United States v. Skipwith*, 482 F.2d 1272, 1276 (5th Cir. 1973). Again, drug searches are always conducted in private.

5. Because all persons are subjected to airline weapon searches, there is no discretion involved. Thus, there is no social stigma associated with the searches. *The Airport Search* at 314. *See also United States v. Skipwith*, *supra* at 1275; *United States v. Albarado*, 495 F.2d 799, 806 (2d Cir. 1974); *People v. Hyde*, 12 Cal. 3d 158, 177, 524 P.2d 830, 843 (1974) (concurring opinion). Compare this with selective searches of poor, Hispanic—often innocent—persons who have no idea why they are being stopped or who is stopping them.

6. All passengers are given advance notice of weapons searches and have the option of avoiding them. Obviously no one has advance notice of a narcotics search.

7. Weapons searches are much less intrusive than the drug profile searches. Once a person stopped for drugs gives any answer the DEA agent "feels" is suspicious, that person is strip searched whereas no one is even frisked for weapons until they have gone through the magnetometer twice. *The Airport Search* at 308-09.

8. The governmental interest—*i.e.* the saving of lives of passengers and crew as well as airline property—is compelling. The Fifth Circuit has said that "the crime of air piracy exceeds all others in terms of the potential for great and immediate harm to

others." *United States v. Moreno*, 475 F.2d 44, 48 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973). That potential is simply not the same where the persons to be caught are small scale "mules" for a much larger narcotics operation which will undoubtedly go on without them.

As stated by the court in *United States v. Van Lewis*, 409 F.Supp. 535, 542 (E.D.Mich. 1976) :

Although the problems caused by illegal drug traffic in the metropolitan areas of the country are serious indeed, they are quite different from the problems posed by the threat of air piracy when both are viewed within the framework of the Fourth Amendment. The would-be air pirate, by obstructing the right to travel and endangering life in wholesale fashion, threatens the fabric of the republic and strikes at the very heart of our legal and moral relationships with one another.

\* \* \*

As damnable as drug traffic is, its regulation involves the protection of no special public interests like those at play in airport security. Regulation of drug traffic is achieved through enforcement of laws adopted by Congress which are similar to laws prohibiting bank robbery, bribery, or conspiracy. Thus, the court perceives no fundamental public interest at stake in routine enforcement of the drug laws which calls for the development of rules unique to airport drug searches. Accordingly, the government's rights in these cases must be tested against basic Fourth Amendment principles rather than by rules derived from an air piracy context.

Amicus therefore respectfully submits that this Court's decision regarding the legitimacy and/or use of drug courier profiles will have no effect on anti-hijacking techniques.

### **A Comparison With Composite Sketch Techniques**

Amicus would also briefly note that a drug courier "profile," admittedly only loosely based on differing characteristics observed by different people and always changing, is nothing like a composite sketch of a person suspected of a crime. First, in the sketch situation police know a crime has been committed whereas no known crime has been committed at the time the drug profile is used. Second, the sketch is drawn from a description given by a person who has seen the offender and it is intended to depict only one person. Third, the composite sketch may be later viewed by others to determine if a particular stop was reasonable, making the users of it more careful. The drug profile has no such built in safeguards. Again, Amicus submits that these differences set the composite sketch technique completely apart from the so-called drug courier profile and that this Court's decision regarding drug profiles will have no effect on the composite sketch technique.

### **III. Border Searches Are Unlike Interstate Searches**

The government, at page 34 of its Brief, indicates that the use of "profiles" has been approved in other contexts, particularly as an aid to United States Customs Service. Warrantless border searches, however, for which customs officers are uniquely responsible, are not an *exception* to the Fourth Amendment warrant requirement; instead such searches have never been subject to Fourth Amendment limitations. Since 1789, customs officers have been authorized by statute to search anyone entering the United States without a warrant or determination of probable cause.<sup>11</sup> In *Boyd*

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<sup>11</sup> Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43. Currently, see 8 U.S.C. § 1357(c) (1970).

v. *United States*, 116 U.S. 616, 623 (1886), this Court reasoned that, since the statute was passed by the same Congress that proposed the Bill of Rights for ratification by the states, border searches were never intended to fall within the proscriptions of the Fourth Amendment. *See generally* Note, "The Constitutionality of Airport Searches," 72 Mich. L. Rev. 128, 138-41 (1973).

Moreover, the Constitution restricts the government's authority to limit *interstate* travel, a limitation clearly ignored in the drug profile stop situation; whereas it explicitly permits extensive regulation of travel into or out of the country. *See Galvan v. Press*, 347 U.S. 522, 530 (1954); *Worthy v. United States*, 328 F.2d 386, 393 (5th Cir. 1964). Thus the entire history of this country supports the authority of customs officers to stop and search for almost any reason while, contrariwise, it negates any recognized authority for such searches away from the borders.

### CONCLUSION

For all the above reasons as well as the reasons set forth in Respondent's Brief, we respectfully request this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

TERENCE F. MACCARTHY  
CAROL A. BROOK  
219 S. Dearborn Street  
Suite 1744  
Chicago, Illinois 60604  
*Counsel for Amicus Curiae*

December 19, 1979

